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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JAVIER MAGANA SANCHEZ, Defendant and Appellant.	G039962 (Super. Ct. No. 06WF3589) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Hoffer, Judge. Affirmed.

Phillip I. Bronson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Elizabeth A. Hartwig, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant was convicted of robbery, conspiracy to rob and car theft. He was also found to have personally used a firearm during the robbery, for which he received a 10-year sentence enhancement. He claims the enhancement is cruel and unusual, and the court prejudicially erred in admitting evidence of his coconspirator's guilty plea. We reject these claims and affirm the judgment.

FACTS

Michael Buckley was a drug dealer who often sold small amounts of marijuana to appellant and Ruben Young. All three were friends, but over time appellant and Young began to suspect Buckley was shortchanging them on their purchases. They also felt Buckley was giving his bigger customers more attention and respect than he was giving them. So, one morning, they went to Buckley's apartment and confronted him about these perceived slights. They talked things over with Buckley but were still not satisfied when they left his apartment after the meeting.

Later that day, appellant called Buckley and said he wanted to buy an ounce of marijuana from him. That was a much larger amount than appellant usually requested, but Buckley agreed to sell it to him. When appellant and Young returned to Buckley's apartment that afternoon, Buckley weighed out the marijuana in front of them and handed it to appellant. However, instead of producing money, appellant produced a handgun and informed Buckley he wasn't going to pay him. He and Young then proceeded to berate Buckley and tell him how fed up they were with him. During this time, appellant was holding the gun about a foot from Buckley's face and brandishing it in a threatening fashion. Buckley was so scared he dropped to his knees and pleaded for his life. Eventually, though, appellant and Young relented and left the apartment.

Young ran to his home, which was just down the block, and appellant got into a silver SUV. Buckley followed him to the vehicle and tried to stop him from

leaving, but appellant brushed him off and drove away. Buckley then called 911 and reported the incident to the police.

That night, Buckley was driving in his neighborhood when he happened to spot appellant in the same SUV. He promptly called the police, and they pulled appellant over not long after that. Young was with him, and when the police searched their vehicle, they found a gun and a baggie of marijuana. They also discovered the vehicle had been stolen about two months earlier.

Appellant and Young were both arrested and questioned by the police. At the beginning of his interview, appellant appeared sleepy and said he had been smoking marijuana. However, as the interview progressed, he perked up and was coherent and alert. When asked what happened in Buckley's apartment, he said Buckley gave him a bag of marijuana and asked for payment. However, instead of paying him, he stepped back and made a statement about having "heat." Buckley tried to grab the bag back, but he became scared and backed off, at which point appellant and Young left with the marijuana.

Appellant confessed — incrementally — to the firearm use. When the police asked him why Buckley was scared, he first speculated Buckley may have thought he had a gun; however, he denied actually having one. Then he said he made a gun gesture with his hands in order to frighten Buckley. After that, he admitted he did in fact have a gun in the backpack he was carrying. And upon further questioning, he finally conceded he removed the gun from his backpack during the robbery, albeit just slightly.

When interviewed by the police, Young said that when he and appellant first visited Buckley in the morning, he was not receptive to their concerns. So, before returning to his apartment later in the afternoon, they talked about how they were going to get through to him. Their plan was to confront Buckley with a gun appellant had in his vehicle. Although the gun was not loaded, they figured they

could use it to intimidate Buckley, which they did. Once they were back inside his apartment, appellant pulled the gun from a backpack and pointed it at Buckley. He told him to give them the marijuana, and Buckley complied. Then, appellant and Young left the apartment.

Before trial, Young pleaded guilty to robbery and conspiracy. Consistent with his statements to the police, he admitted in his plea form that "I did conspire with another person and did unlawfully by means of force or fear take the personal property of Michael Buckley from his immediate presence while he was in an inhabited dwelling, [and] I was vicariously armed with a firearm."

At trial, however, Young testified he and appellant did not conspire to rob Buckley, bring a gun into his apartment or threaten him in any manner. Rather, he claimed that once they were inside the apartment, they merely questioned the weight of the marijuana Buckley was selling them, after which, Buckley just let them have it so they would leave him alone. Young also testified that he was high on marijuana when he spoke to the police and that he just told them what they wanted to hear. He said he pleaded guilty not because the statements in his plea form were true, but simply to avoid a longer sentence.

The jury convicted appellant of robbery, conspiracy to rob and vehicle theft. It also found he personally used a firearm during the robbery and the conspiracy. The court sentenced him to 13 years in prison, representing the low term of 3 years for the robbery, plus a 10-year enhancement for the firearm use. It imposed and stayed the same sentence for the conspiracy, and it imposed a concurrent two-year term for the vehicle theft.

I

Appellant contends the court erred in allowing the jury to learn that Young had pleaded guilty to the very crimes for which he was on trial. While admitting the plea was relevant to Young's credibility, appellant maintains it should

have been excluded as being unduly prejudicial. (Evid. Code, § 352.) Alternatively, he asserts the court should have instructed the jurors they could only consider the plea for the purpose of assessing Young's credibility, and not as evidence of his (appellant's) guilt.

In the headings of his brief, the Attorney General asserts the trial court acted properly in admitting Young's plea without a limiting instruction. However, he fails to support this assertion in the body of his argument. Instead, he argues appellant waived his challenges to Young's plea by failing to raise them in the trial court, and any error in admitting the plea was harmless. We agree appellant waived his right to challenge the admission of Young's guilty plea by failing to object to it below. (*People v. Hinton* (2006) 37 Cal.4th 839, 893, fn. 19 [failure to object to evidence under Evidence Code section 352 waives claim on appeal].) However, the issue of whether the court erred in failing to instruct the jurors about the limited purpose for which they could consider the plea is a different matter.

Irrespective of the instructions requested by the parties, the trial court has an independent obligation to instruct the jury on all of the general principles that are closely and openly connected with the facts of the case. (*People v. Abilez* (2007) 41 Cal.4th 472, 517.) The evidence Young pleaded guilty to the crimes for which appellant was on trial brought into play one principle that was clearly applicable in this case, namely "'evidence about the conviction of a [codefendant] is not admissible as substantive proof of the guilt of a defendant.' [Citation.]" (*United States v. Mitchell* (4th Cir. 1993) 1 F.3d 235, 240.) Were that not the case, the jury in a criminal trial might be inclined to convict the defendant based solely on his association with others. And that would be anathema to the concept of fairness embodied in our criminal justice system. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1322 [probative value of codefendant's guilty plea was clearly outweighed by the prejudicial impact of the plea]; *People v. Leonard* (1983) 34 Cal.3d 183, 188-189

[evidence that person involved in charged offense had pleaded guilty was inadmissible against the defendant because it invited an improper inference of guilt by association].)

Therefore, having allowed the prosecution to introduce evidence of Young's guilty plea, the trial court should have instructed the jurors they could only consider the plea for the purposes of assessing Young's credibility and not as proof of appellant's guilt. (*United States v. Halbert* (1981) 640 F.2d 1000, 1007.) Since the trial court had a sua sponte duty to instruct the jurors in this regard, appellant's failure to request a limiting instruction does not preclude him from raising the issue on appeal. And, as we have noted, the Attorney General does not offer a substantive defense of the court's failure to give a limiting instruction in this case. Therefore, we will proceed to the issue of prejudice.[1]

When the court errs in admitting the guilty plea of a participant in the crimes for which the defendant is on trial, "we must determine from the whole record whether it is reasonably probable that without the error a result more favorable to defendant would have occurred." (*People v. Leonard, supra*, 34 Cal.3d at p. 189.) In *Leonard*, the circumstances were such that the defendant was prejudiced under this standard. That's because the subject guilty plea was considered crucial to the prosecution's case on the issue of identification. (*Ibid*.)

Here, however, identification was not an issue at all, and Young's guilty plea was not crucial to the prosecution's case in any respect. The plea did indicate appellant used a gun in robbing Buckley and that he conspired with Young to commit the robbery. However, Buckley testified at length about the gun, and although he gave inconsistent statements about what the gun looked like and how appellant used

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[1] Appellant also contends his attorney was ineffective for failing to object to Young's guilty plea or at least request a limiting instruction. Assuming that were the case, that would lead us to the issue of prejudice, as well. (See *Strickland v. Washington* (1984) 466 U.S. 668, 697-698 [attorney misfeasance does not require reversal absent resulting prejudice to the defendant].)

it, he was unequivocal in his assertion that appellant did in fact have a firearm during the robbery.

So was Young, at least when he spoke to the police following his arrest. At that time, Young made it clear appellant pointed a gun at Buckley in order to get him to surrender the marijuana. Although Young tried to downplay his post-arrest statements at trial, they constituted powerful evidence appellant used a gun during the robbery.

Most important, it is something appellant himself admitted in his interview with the police. At first he denied having a gun at all, then he conceded he did have one in his backpack, and then he finally admitted he took the gun out of the backpack. The nature of appellant's confession clearly shows he was trying to hide the fact that he used a gun during the robbery. We are confident in saying that given everything the jury properly heard in this case, Young's guilty plea was not a material piece of evidence on the gun issue.

Because appellant did not confess to the crime of conspiracy, Young's guilty plea may have played a bigger role in terms of proving that charge. Indeed, this is likely considering the prosecutor referred to Young's plea in arguing to the jury that appellant was guilty of conspiracy.[2] However, the plea did not represent Young's sole admission of liability as to that offense. Upon arrest, he gave a detailed account of his actions on the day in question. And in so doing, he readily admitted that when he and appellant returned to Buckley's apartment, they decided before going inside that they were going to use the gun to confront Buckley and steal his marijuana. This damning admission rendered Young's guilty plea cumulative as to the conspiracy

[2] The prosecutor said the evidence points to the conclusion that appellant "conspired with Young. [Young] pled guilty, ladies and gentlemen. He told the officers, and he pled guilty. [Appellant] conspired with Young in the car to rob Buckley."

charge. Therefore, unlike the circumstances of *Leonard*, here the guilty plea was not a critical component of the prosecution's case.

In assessing prejudice, it is also significant that defense counsel cross-examined Young extensively about his plea. During that time, Young disavowed the plea in its entirety and claimed the only reason he took it was so he could obtain a more favorable sentence. He also said that he would have pleaded guilty to just about anything, in order to get out of jail, and that the plea did not reflect his true culpability or what actually happened in the case. Thus the effect of the plea was somewhat diminished, as opposed to the effect of an unrecanted plea.

For all of these reasons, we believe it is not reasonably probable appellant would have obtained a more favorable result had the court excluded Young's guilty plea or instructed the jurors to consider it only for the limited purpose of assessing his credibility. Therefore, there is no cause for reversal.

II

Appellant also claims his sentence is cruel and unusual, but that is clearly not the case.

Appellant was sentenced to the lower term of three years for the robbery. And because he used a firearm during that offense, he was subject to a 10-year sentence enhancement pursuant to Penal Code section 12022.53, subdivision (b).[3] Appellant argued imposition of the enhancement was cruel and unusual under the circumstances of his case, but the trial court found, "[T]his is not an unusual [case] for the imposition of the [Penal Code section] 12022.53[, subdivision] (b) enhancement. It is . . . pretty much right down the middle." Therefore, it imposed the enhancement and sentenced appellant to a total term of 13 years in prison. In so

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[3] That section provides, "Notwithstanding any other provision of law, any person who, in the commission of [an enumerated felony, including robbery,] personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. The firearm need not be operable or loaded for this enhancement to apply." (Pen. Code, § 12022.53, subd. (b).)

doing, the court noted appellant has "a serious criminal history," and if the court hadn't stayed sentence or imposed concurrent terms on the other charges, appellant's sentence "could have been much higher."

Appellant takes little solace in that fact. Instead, he would have us believe his 13-year sentence "'is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.'" (*People v. Dillon* (1983) 34 Cal.3d 441, 478 (*Dillon*).) We are not persuaded of this.

In assessing proportionality under *Dillon*, we must examine "'the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society.' [Citation.]" (*Dillon, supra*, 34 Cal.3d at p. 479.) Factors surrounding the commission of the offense include "its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts." (*Id.* at p. 479.) Factors regarding the offender include his "age, prior criminality, personal characteristics, and state of mind." (*Ibid.*)

We must also remember that "[r]educing a sentence under *Dillon* 'is a solemn power to be exercised sparingly only when, as a matter of law, the Constitution forbids what the sentencing law compels.' [Citation.] The reduction of a sentence because it is cruel or unusual '"must be viewed as representing an exception rather than a general rule.'" [Citations.]" (*People v. Felix* (2003) 108 Cal.App.4th 994, 1000; accord, *Solem v. Helm* (1983) 463 U.S. 277, 289 [under the United States Supreme Court's Eighth Amendment jurisprudence, "successful challenges to the proportionality of particular sentences (are) exceedingly rare"].)

In *People v. Felix, supra*, the defendant was convicted of carjacking, auto theft, receiving stolen property, and giving false information to a police officer. Because he took the victim's car at gunpoint, he was also subject to the 10-year enhancement set forth in Penal Code section 12022.53, subdivision (b.) However, the

trial court struck the enhancement on the ground it would amount to cruel and unusual punishment and imposed a total prison term of nine years. (*People v. Felix, supra*, 108 Cal.App.4th at pp. 996-997.)

In reversing, the *Felix* court noted the defendant was motivated by financial gain; his conduct was premeditated (not spontaneous or passive); and he used his gun in a threatening fashion by pressing it against the victim's ribs. In addition, he displayed no remorse for his actions and had twice entered the country illegally. (*People v. Felix, supra*, 108 Cal.App.4th at pp. 1000-1001.) Although those entries had not resulted in a criminal conviction, and although the defendant was only 17 years old at the time of his crimes, the court did not believe it would be cruel and unusual to subject him to the 10-year gun enhancement. (*Id*. at pp. 1001-1002.)

In making this determination, the *Felix* court stated, "We do not find [the defendant] comparable to the unusually immature 17-year-old defendant in *Dillon* who panicked and shot and killed a man guarding a field from which the defendant and his companions had planned to steal marijuana. [Citation.]" (*People v. Felix, supra*, 108 Cal.App.4th at p. 1001, fn. omitted.) Indeed, the *Dillon* court observed that young Mr. Dillon was so fearful during the shooting that he "probably 'blocked out' the reality of the situation and reacted reflexively, without thinking at all." (*Dillon, supra*, 34 Cal.3d at p. 483.) Thus, the Supreme Court determined it would be cruel and unusual to sentence him to life in prison for felony murder. (*Id*. at pp. 482-489.)

Unlike the defendant's actions in *Dillon*, appellant's conduct was not the result of panic or unexpected consequences. Instead, he acted in a planned and deliberate manner to steal drugs from the victim at gunpoint. His obvious motives were revenge and greed, and although his gun may not have been loaded, his actions created the potential for considerable danger from the defensive reactions of the victim. (*In re Arturo H.* (1996) 42 Cal.App.4th 1694, 1698.) The robbery was

certainly not "'one of the most passive felonies a person could commit.'" (*Solem v. Helm, supra*, 463 U.S. at p. 296 [finding defendant's life sentence without the possibility of parole disproportionate to his offense of uttering a bad check].)

Moreover, there is no evidence appellant was ignorant of the danger he created. Whereas the defendant's immaturity in *Dillon* effectively precluded him from foreseeing the risks of his conduct (*Dillon, supra*, 34 Cal.3d at p. 488), appellant cannot hide behind the cloak of ignorance. At 19 years of age, he was a full-fledged adult when he committed the present crimes. And while it is possible he may have been under the influence of marijuana at the time, the record provides no reason to believe he was unaware of the dangers of his gun-toting behavior.

The probation report also shows that although appellant has previously been involved in a variety of drug and property crimes, including residential burglary, he has "failed to take advantage of numerous opportunities to address his substance abuse and personal problems while he was on juvenile probation." Appellant's track record in this regard is further reason to uphold the constitutionality of his sentence in this case.

In the end, when we look at the nature of appellant's conduct in this case, as well as his individual characteristics and background, we do not believe that subjecting him to a 13-year prison sentence would shock most people's conscience or offend fundamental notions of human dignity. We find his sentence to be constitutional.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

ARONSON, J.